Supreme Court, U.S.
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NO. 92-1824

In the Supreme Court of the United States

OCTOBER TERM, 1993

MAPCO PETROLEUM, INC.
Petitioner

versus

MEMPHIS BARGE LINE, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF TENNESSEE

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MACHALE A. MILLER
MARVA JO WYATT
O'NEIL, EICHIN, MILLER
& BRECKINRIDGE
One Poydras Plaza, 26th Floor
New Orleans, Louisiana 70113
504/525-3200

ATTORNEYS FOR
DEFENDANTS-RESPONDENTS

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NO. 1

Whether the Supreme Court of Tennessee correctly concluded that when exercising its concurrent jurisdiction over an admiralty and maritime matter pursuant to the Saving to Suitors Clause and 28 U.S.C. § 1333, a state court is empowered, has jurisdiction and is obliged to decide the merits of the affirmative defense of limitation of liability created in 46 U.S.C. § 183.

QUESTION NO. 2

Whether a state court exercising the concurrent jurisdiction granted by the Saving to Suitors Clause and 28 U.S.C. § 1333 is bound to follow erroneous *obiter dictum* of lower federal courts as mandatory authority.

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MISCELLANEOUS

G. Gilmore & C. Black, *The Law of Admiralty*, (2d ed 1979) at p. 47 14

STATUTES APPLICABLE TO THE CASE

28 U.S.C. § 1333

The district courts shall have original jurisdiction, exclusive of the courts of the States of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

46 U.S.C. § 183

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $60 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $60 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is insufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purpose of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage; *Provided*, That there shall not be included in any such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent

or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, non-descript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title.

46 U.S.C. § 185

The vessel owner, within six months after a claimant shall have given to or filed with such owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter and the owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the interest of such owner in the vessel and freight, or approved security therefor, and in addition such sums, or approved security therefore, as the court may from time to time as necessary

to carry out the provisions of section 183 of this title, or (b) at his option shall transfer, for the benefit of claimants, to a trustee to be appointed by the court his interest in the vessel and freight, together with such sums, or approved security therefore, as the court may from time to time fix as necessary to carry out the provisions of section 183 of this title. Upon compliance with the requirements of this section all claims and proceedings against the owner with respect to the matter in question shall cease.

46 U.S.C. § 740

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vesssel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: *Provided*, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not

been hitherto filed under the Federal Tort Claims Act: *Provided further,* That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

STATEMENT OF THE CASE

The principal issue presented to the court in MAPCO's Petiton For Writ of Certiorari is whether a plaintiff's exercise of its constitutional and statutory right to a state forum in an admiralty and maritime claim functions to deprive a defendant of its statutory right to the substantive defense of limited liability established by 46 U.S.C. § 183, thus altering the established rule that a state court, when hearing an admiralty and maritime claim, must apply general maritime law including all supplementary statutes. The second issue framed by MAPCO, namely whether a state supreme court must follow lower federal court *obiter dictum*, stems from MAPCO's failed attempt to transform unreasoned *dictum* into mandatory authority and then impose it upon Tennessee's high court. That court, quite rightly, refused to follow the unreasoned and erroneous *dictum* espoused in *Cincinnati Gas & Electric Co. v. Abel*, 533 F.2d 1001 (6th Cir.) *cert. denied*, 429 U.S. 858 (1976), and *Vatican Shrimp Co. v. Solis*, 820 F.2d 674 (5th Cir.) *cert. denied*, 484 U.S. 953 (1987), choosing instead to properly construe this Court's pronouncements in *Langnes v. Green*, 282 U.S. 531 (1931), and its companion case *Ex Parte Green*, 286 U.S. 437 (1932), and to conclude that the Tennessee courts are empowered to hear not only MAPCO's claim for damages but also Memphis Barge Line's limitation defense.

MAPCO correctly argues that Memphis Barge Line ("MBL") knew that MAPCO's damages potentially would exceed the value of MBL's interest in the vessel and her pending freight before the expiration of the six month period within which to convoke a concursus under 46 U.S.C. § 185. MBL also knew, however, that MAPCO would be the only potential claimant in such a proceeding. Accordingly, the concursus procedure afforded by 46 U.S.C. § 185 would have been an unnecessary waste of judicial resources because the § 185 concursus would accomplish no more or less than the injured party's state court suit. *Langness* and *Green*, when properly read and understood, do not compell such a result.

Langnes and *Green* arose in a unique procedural context that must be appreciated to understand the principle established therein. Those two cases involved a situation wherein a marine casualty caused only one injury. The injured party, exercising the option accorded by the Saving to Suitors Clause, filed suit in state court. The defendant-shipowner, exercising its option bestowed by 46 U.S.C. § 185, commenced a limitation proceeding in federal court. *Langnes* was decided prior to the 1936 amendment to § 185 which imposed a six month time limitation upon the § 185 concursus; in *Langnes* the vessel owner waited until the eve of the state court trial to convoke the § 185 concursus, thereby enjoining the nearly completed state suit. This Court's decision in *Langnes* was tailored to this particular procedural posture, and the Court concluded that because there was only one potential claimant to the limitation fund and because the state suit had proceeded almost to trial, the conflict between the plaintiff's right to a state forum under the Saving to Suitors Clause and the defendant's right to a § 185 concursus proceeding should be resolved by deferring to the plaintiff's choice of forum for its tort claim while still preserving the defendant's choice of forum for its limitation defense. In doing so, the *Langnes* Court stated:

> That the action brought in the state court was authorized by [the Saving to Suitors Clause], is plain. That the petition of the owner in the present case was properly brought, and that the federal court had jurisdiction to entertain it, whether there was a plurality of claims or only one, is equally clear...
>
> * * *
>
> The situation, then is that one statute gave respondent the right to a common-law remedy, which he properly sought in the state court; and another statute gave petitioner the right to seek

a limitation of liability in the federal District Court.

* * *

In this situation, while there is some conflict among the decisions of the lower courts, this court has accepted the view that, "in a state court, when there is only one possible claimant and one owner, the advantage of this section § 4283 (46 USCA § 183) may be obtained by proper pleading.

* * *

Upon the present record, the necessary result of this holding is that the state court, in the action there pending *and in the due course of the exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject.*

* * *

To retain the cause would be to preserve the right of the shipowner, but to destroy the right of the suitor in the state court to a commonlaw remedy; to remit the cause to the state court would be to preserve the rights of both parties.

Langnes, 282 U.S. at 539-41.

The *Langnes* court was presented with conflicting interests—the injured party's right to proceed in state court, and the vessel owner's right to proceed by concursus in federal court. Because there was only one claimant, the vessel owner did not have a substantive need for a limitation action; thus opening the door for the *Langnes* Court's compromise. To effectuate this Solomonic solution, the *Langnes* Court ordered a dissolution of the federal court's restraining order (which was entered when the shipowner

commenced the § 185 concursus) but further ordered the federal court to retain jurisdiction over the shipowner's § 183 defense in order to accommodate the shipowner's statutory right, which arose upon its filing a § 185 proceeding, to have that defense determined in federal court. *Langnes* did *not* hold that under any circumstance *only* a federal district court was empowered to adjudicate a § 183 affirmative defense, but rather that a shipowner's choice of federal forum pursuant to § 185, like a plaintiff's choice of state forum pursuant to 28 U.S.C. § 1333, should not be disregarded if an effective compromise can accommodate both.[1]

The *Langnes* court ordered the federal district court to remand the plaintiff's damage suit to the state court with the caveat that the federal district court was to decide the vessel owner's limitation defense *if* plaintiff chose to contest it. Upon remand, the plaintiff (in defiance of the *Langnes* Court's prohibition) attempted to contest the vessel owner's right to limitation in the state court proceeding. The vessel owner then sought and was granted injunctive relief by the federal court thereby enjoining further prosecution of the state court suit.The plaintiff petitioned for a writ of mandamus, which was denied in *Green*, wherein the court stated:

> It is clear from our opinion that the state court has no jurisdiction to determine the question of the owner's right to a limited liability, and that, if the value of the vessel be not accepted as the limit of the owner's liability, the federal court is authorized to resume jurisdiction and dispose of the whole case.[2]

It is this language from *Green* which, taken out of context,

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[1] *Langnes v. Green*, 282 U.S. 531, 541-43 (1931). That effective compromise is available only when there is but a single claimant so that the risk of the vessel owner defending multiple suits in multiple jurisdictions is nonexistent.

[2] *Ex Parte Green*, 286 U.S. 437, 439-40.

has spawned *Cincinnati Gas* and its ill-reasoned progeny. This statement about absence of jurisdiction does not and was not intended to establish a universal truth that a state court never has jurisdiction to decide the § 183 defense. This statement merely conveys the Court's Solomonic resolution of the conflict created when a single-claimant casualty results in a Saving-to-Suitor-Clause state court suit filed by the claimant and a § 185 concursus filed by the vessel owner in federal court.

The right to limit liability created by § 183 is a substantive right under federal maritime law. Section 185 creates a remedy — a means for enforcing this right in a concursus. It is irrelevant that at the time the Judiciary Act of 1789 was enacted there was no statutory right to limit liability — the same can be said of many other substantive admiralty statutes, such as the Jones Act, 46 U.S.C. § 688. The Saving to Suitors Clause does not speak in terms of rights but rather in terms of remedies — a dispositive distinction.

SUMMARY OF ARGUMENT

The Tennessee Supreme Court correctly determined that the Saving to Suitors Clause confers concurrent jurisdiction over not only MAPCO's cause of action for damages arising from a maritime tort but also MBL's statutory affirmative defense to that cause of action. The Tennessee Supreme Court began its analysis by accepting MAPCO's initial premise that Article III, Section 2 of the U.S. Constitution vests admiralty and maritime jurisdiction in the federal courts. That court however rejected the untenable conclusion which MAPCO seeks to extract from this premise, *i.e.*, that while the state courts have concurrent jurisdiction to adjudicate MAPCO's claim, they are not empowered to adjudicate MBL's affirmative defense of limitation conferred by § 183. Instead, the Tennessee Supreme Court, after reviewing §§ 183 and 185, studying the *Langnes-Green* principle, and applying basic principles of federalism, concluded that a state court is empowered and indeed obliged to decide MBL's limitation defense on its merits. The Tennessee Supreme Court predicated that

conclusion upon the following uncontrovertible considerations:

1. MAPCO's state court action was commenced under the auspices of the Saving to Suitors Clause.

2. A state court, when deciding such a case, is obliged to apply general maritime law, and, in any event, is always obliged to apply applicable federal statutes.

3. General maritime law consists of authoritative court decisions and supplementary acts of Congress.

4. The limitation defense of 46 U.S.C. § 183 is a substantive provision that supplements general maritime law and is an applicable federal statute.

5. 46 U.S.C. § 185 merely affords a vessel owner a procedural option — upon being sued in state court the vessel has alternate courses of action: (a) defend the state court action, or (b) file a § 185 action in federal court and obtain a stay of the state court action.

6. The substantive § 183 defense may be asserted defensively by pleading it as an affirmative defense to the injured claimant's suit or offensively by commencing a § 185 action, asserting the defense and obtaining a stay of all other suits.

7. Whereas § 185 limits the jurisdiction in which the concursus may be filed (the appropriate federal district court), § 183 significantly contains no jurisdictional restriction.

8. The *Langnes-Green* principle of exclusive federal jurisdiction has a narrow scope and is restricted to a situation wherein the vessel owner files a § 185 concursus action in response to a claimant's state court action under the Saving to Suitors Clause and wherein only one party was injured so that the vessel owner does not need a § 185 concursus to protect it against multiple suits.

10. MAPCO is the sole injured party, and MBL chose to forego the time-consuming and costly filing of an unnecessary § 185 concursus instead opting to defend the state court action and have its § 183 substantive defense

resolved by the Tennessee court, so that the conflict of rights that engendered the *Langnes-Green* Solomonic solution never arose.

This Court's decisions in *Langnes* and *Green* do not squarely address the issue of the scope of concurrent jurisdiction conferred by 28 U.S.C. § 1333. Instead, they address the interface between a vessel owner's § 185 concursus remedy and a tort claimant's state law remedy. *Cincinnati Gas* and *Vatican Shrimp* did not decide the issue presented here, namely whether the concurrent jurisdiction granted to the states by 28 U.S.C. § 1333 includes the right to decide the affirmative defense of limitation of liability. The *dictum* expressed in *Cincinnati Gas* and *Vatican Shrimp* demonstrates why *dictum* is accorded no precedential weight.

The majority of state high courts which have considered the issue have correctly concluded that the state courts are empowered to adjudicate a § 183 limitation defense. *Brinson & Kramer v. Norfolk S.R. Co.*, 86 S.E. 371, 373 (N.C. 1915); *Loughin v. McCaulley*, 40 A. 1020 (Pa. 1898); The *GOLDEN TOUCH*, 1967 A.M.C. 353 (R.I. 1966) *cert. denied* 226 A.2d 505, 1967 A.M.C. 356. These courts and now the Tennessee Supreme Court, in a well-reasoned decision, have correctly interpreted § 183 and have correctly read *Langnes* and *Green*. MAPCO's petition should be denied.

ARGUMENT

MAPCO contends that the exercise of its Saving-to-Suitors choice of forum divests MBL of its limitation defense.[3] MAPCO has failed to articulate a rationale for such an anomalous elevation of form over substance, instead dogmatically insisting that the Tennessee courts

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[3] The argument essentially seeks to bootstrap the temporal and jurisdictional constraints of the Section 185, concursus remedy into the substantive Section 183, 46 U.S.C. § 183, defense — which is not similarly temporally and jurisdictionally constrained. *See, e.g. Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d 1164 (5th Cir. 1981); *Murray v. New York*

must blindly follow unsupportable *dictum* in *Cincinnati Gas* and *Vatican Shrimp*. MAPCO's inability to present a convincing analysis forced it to argue to the Tennessee courts that they could not question *Cincinnati Gas* and *Vatican Shrimp*.

MAPCO sold this argument to a dismayed state district court,[4] who felt constrained to follow *Cincinnati Gas* and *Vatican Shrimp* even though he stated, "I don't like the law in them . . . I think they're wrong."[5] The Tennessee court of appeals likewise concluded it was bound to follow *Cincinnati Gas* and progeny,[6] but remanded the case to Judge Chandler to determine whether MAPCO's opposition to MBL's limitation defense "is sufficiently based in fact as to be nonfrivolous."[7] The appellate court's equitable (but improper) solution was based upon its erroneous reading of *Langnes* and *Green:*

> We agree with the defendant that striking the defense and leaving them without a forum in

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(footnote 3 continued)

Central Rwy Co., 285 F.2d 152, 153-54 (2d Cir.) *cert. denied* 366 U.S. 945 (1961); The *CHICKIE*, 141 F.2d 80, 84 (3d cir. 1944).

[4] Honorable Wyeth Chandler of Tennessee's Thirtieth Judicial District presided over the case in the district court. His oral reasons appear as Appendix C to MAPCO's petition.

[5] Judge Chandler's oral reasons are attached as Appendix C to MAPO's petition:

> There's no question about it in my judgement they're controlling cases in this case. I don't like the law in them to be honest with you. I mean I don't even like what they hold, I think they're wrong, but that's not my decision.

[6] A number of lower federal courts have repeated the *dictum* in *Cincinnati Gas* without analysis, but the Court should note that each such case will be found in the same procedural context as *Langnes* and *Green* and is thus not applicable, as will be discussed hereinabove. *See, e.g., In re Bayview Charter Boats, Inc.*, 692 F.Supp. 1480 (E.D.N.Y. 1988).

[7] Opinion of Court of Appeals of Tennessee Western Section at Jackson, attached as Appendix B to MAPCO's petiton at B-8.

> which to assert the defense *is* a harsh result. This is especially so in light of the fact that the defendant could lose the availability of the defense even if the plaintiff's challenge to its availability is not based on fact and [is] therefore frivolous. This result is seemingly in conflict with the Supreme Court's statement in *Langnes v. Green, supra,* that the state courts are "competent to entertain a claim of the ship owner for a limitation of liability and afford him appropriate relief under the statute dealing with the subject." *Id.* at 247. We find, however, that absent further direction from the Supreme Court, this is the only approach which is consistent with the statements in *Langnes* and *Ex Parte Green* indicating that the state courts do not have jurisdiction to decide whether a vessel owner is entitled to limit his liability once that right has been challenged by the claimant.[8]

The Tennessee appellate court failed to discern the distinct and unique procedural context of *Langnes* and *Green*, and this difference is dispositive. The Tennessee Supreme Court fully understood the distinction:

> Significantly, the Court in *Langnes* and *Ex Parte Green* did not hold that where, as in the instant case, the vessel owner elects to proceed with its limitation defense as an affirmative defense in the state court action instead of filing a Section 185 petition in federal court, the state court does not have subject matter jurisdiction. Read together, *Langnes* and *Ex Parte Green* hold only that when the injured party sues in state court *and the vessel owner responds by filing a Section 185 petition in federal court,* the federal court has jurisdiction. The difference between *Langnes* and *Ex Parte Green* and the instant case is that MBL did not file a Section 185 petition in federal court —

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[8] Opinion of Court of Appeals, MAPCO Appendix B, B-7.

unlike the vessel owner in *Langnes*.[9]

Langnes and *Green* do not hold that when a defendant-vessel owner pleads § 183 limitation as an affirmative defense in a state court action and elects to forego a § 185 proceeding, the state court is not competent and has no jurisdiction to adjudicate the merits of the § 183 defense. That situation was not presented in *Langnes* and *Green* — instead the vessel owner filed a § 185 proceeding in federal court seeking a stay of the state court action. *Langnes* and *Green* hold only that in the specific situation wherein (1) the injured party elects to proceed in state court and (2) the vessel owner, instead of asserting § 183 as an affirmative defense in that state court proceeding, elects, as is its right, to assert the § 183 substantive defense in a § 185 proceeding, the federal court then *and only then* acquires exclusive jurisdiction to hear the § 183 defense.[10]

Langnes and *Green* were not squarely presented with the question of whether a state court should hear a § 183 limitation defense when a § 185 federal court proceeding is not pending, because indeed a § 185 proceeding was underway. *Langnes*, nevertheless, during the course of syllogistically analyzing competency of state courts to decide a § 183 defense concluded that indeed a state court should do so. In that regard, *Langnes* expressly observed

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[9] Tennessee Supreme Court Opinion, MAPCO Appendix A, at A-9 (emphasis supplied).

[10] In *Langnes* the defendant-shipowner did *not* plead limitation as an affirmative defense in the state court action. In the instant case, MBL exercised its option and elected to assert the Section 183 substantive limitation defense in MAPCO's state court proceeding. In *Cincinnati Gas* and *Vatican Shrimp* the defendant-shipowners plead limitation as an affirmative defense in the state court actions; and, when the plaintiffs contested the vessel owner's right to limit on the basis of the presence of privity and knowledge, the defendant-shipowners, based upon a complete misreading of *Langnes* and *Green*, erroneously, indeed foolishly, conceded that the state court was ousted of jurisdiction to hear the § 183 limitation defense. MBL should not be penalized for other vessel owners' misappreciation of the law.

that "the advantage of this section [... 46 U.S.C. § 183] may be obtained by proper pleading" and that "the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and *afford him appropriate relief under the statute dealing with that subject.*" 282 U.S. at 540 (emphasis supplied). This pronouncement is consistent with the basic principle that state courts not only may but must enforce federal statutes. The only reason *Langnes* did not allow the state court to decide the § 183 defense is because the filing of the § 185 proceeding deprived the state court of all jurisdiction and, purely as an equitable and practical response to the situation, the *Langnes* court restored, but on a restricted basis, the state court's jurisdiction, conferring the narrow power to decide liability but not limitation.

Indeed, as previously mentioned, § 183 imposes no jurisdictional constraints upon its assertion, whereas § 185 does. This clear-cut distinction in statutory language mandates a clear-cut distinction in treatment — the § 183 defense, in accordance with basic principles of federalism, can be asserted and resolved in either federal or state court at the vessel owner's option; whereas a § 185 petition, by its express enabling language, accords the appropriate federal district court exclusive jurisdiction over the limitation proceeding and thus may be commenced and prosecuted only in federal court. Indeed, the language difference between §§ 183 and 185, wherein the former contains no jurisdictional constraint and the latter does, fully supports the above-quoted statement in *Langnes* establishing that the state court is competent to decide the § 183 defense. To repeat, only when the vessel owner invokes exclusive federal jurisdiction over the entire controversy by filing a § 185 action does a state court lose jurisdiction.

Cincinnati Gas and *Vatican Shrimp* address solely the narrow legal issue of whether the six-month time limitation for commencing a § 185 petition in federal court is

tolled or interrupted by the vessel owner's pleading the § 183 limitation defense within the applicable six month interval in the plaintiff-injured party's state court action. Both courts simply held that pleading the § 183 limitation defense in the state court action did not toll the six-month time limit in § 185 so that the vessel owner's federal court § 185 petition was not timely commenced. Both courts and all parties to those two proceedings assumed (rather blithely and certainly erroneously) that, as a consequence, the vessel owner had no means of having its § 183 substantive limitation defense heard. That question, however, was not addressed to either of the two federal appellate courts and moreover could only be addressed to the state courts, because the issue, as a matter of *ratio decidendi,* can only arise in a state court action.[11] Unfortunately, the vessel owners in *Cincinnati Gas* and *Vatican Shrimp* failed to appreciate the jurisdictional distinction between § 183 and § 185 and erroneously conceded that the state court could not entertain the merits of the § 183 defense.

Cincinnati Gas and *Vatican Shrimp,* therefore, simply do not address the issues presented here. They do not involve the same procedural context. They are not worthy of any precedential value.

Admiralty Jurisdiction and the Saving-to-Suitors Clause

As previously mentioned, MAPCO was able to commence its admiralty suit in state court because of the exception to exclusive federal court jurisdiction granted by the Saving to Suitors Clause. An appreciation of the validity of the Tennessee Supreme Court's decision requires a discussion of the law applicable in a Saving-to-Suitors Clause matter and of the manner in which a state court should handle such an action. The origin of the Saving to Suitor's Clause rests in Article Section 9 of the U.S. Constitution as implemented in the Judiciary Act of 1789

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[11] Because the *Cincinnati Gas* and *Vatican Shrimp* actions were not commenced timely, the federal courts' jurisdiction did not vest, thus the federal courts could not enjoin or restrain the prosecution of the state court suits under Section 185.

wherein the United States Congress reserved unto the states jurisdiction over admiralty and maritime matters whenever the common law provided a remedy for the enforcement of substantive admiralty and maritime rights:

> [T]he district courts ... shall also have exclusive original cognisance of all civil causes of admiralty and maritime jurisdiction ... saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it.[12]

Subsequent judicial interpretation of saving-to-suitors concurrent jurisdiction has determined that the common law provides a remedy for *all* substantive admiralty and maritime rights except the cause of action against the vessel itself, which invokes the so-called *in rem* remedy.[13]

A state court, when hearing an admiralty claim under the Saving to Suitors Clause, must apply general maritime law. *Carlisle Packing Co. v. Sandanger,* 259 U.S. 255 (1922); *Jansson v. Swedish American Line,* 185 F.2d 212 (1st Cir. 1950); *Rojas v. Roban,* 90 So.2d 58, 61 (La. 1956); *Scudero v. Todd Shipyards Corp.,* 385 P.2d 551 (Wash. 1963). For example, in *Larios v. Victory Carriers, Inc.,* 316 F.2d 62, 65 (2d Cir. 1963), the court, in referring to admiralty claims commenced both in state court under the Saving to Suitors Clause and in federal court on the "law side" under diversity of citizenship, held: "For it is now clear that the maritime law controls all 'substantive' issues in the disposition of maritime claims regardless of the form or forums of suit." Accordingly, when deciding a damage action in the exercise of its concurrent jurisdiction under the auspices of the Saving to Suitors Clause, a state court must apply federally-adopted general maritime law.

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[12] 1 Stat. 76-77.

[13] In any *in rem* action, the offending vessel is fictitiously personified as a legal entity. The vessel itself is made defendant and, if found liable, can be sold to pay the damages awarded. See *The Hine v. Trevor,* 71 U.S. (4 Wall.) 555 (1867); *The Moses Taylor,* 71 U.S. (4 Wall) 411 (1867).

General maritime law consists of decisional law and of supplementary statutes enacted by Congress. In conferring judicial power in admiralty cases, the constitution empowered Congress "to alter and supplement the general maritime law." As stated in G. Gilmore & Black, *The Law of Admiralty* (2d ed. 1979) at p. 47:

> Many statutes — some of great importance — have been passed in the exercise of this power. None, apparently, has ever been declared unconstitutional. Some have added to the judicial jurisdiction; some have changed or filled out substantive rules of maritime law; a few have added whole new chapters of law to the corpus.

The right to limit liability created by § 183 is a substantive admiralty and maritime right that may be asserted in an affirmative defense which itself is a common law remedy.[14] The § 183 defense, which is a supplementary statute, is part and parcel of the general maritime law. MAPCO in candor cannot contend that the state courts are not competent to enforce a garden-variety federal maritime law right such as, for example, proportionate fault, by way of an affirmative defense.[15] But this in effect *is* the very position it advances here, because limitation is likewise simply an affirmative defense. Yet by misreading *Langnes* and *Ex Parte Green*, MAPCO attempts to bootstrap the jurisdictional constraint of § 185 into § 183 in the face of black letter law which holds that § 185 is not the exclusive *remedy* to enforce the § 183 *right*.

MAPCO was able to bring its proceeding in the Tennessee state court under the Saving to Suitors Clause

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[14] *Signal Oil*, 654 F.2d at 1173; *The Chickie*, 141 F.2d at 84.

[15] The substantive federal maritime law rejects the notion that a plaintiff's contributory negligence operates as a complete bar to recovery and instead follows the rule of reducing recovery by his proportionate fault, which is plead as an affirmative defense. *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

because Mapco sought only a common law remedy, *i.e.*, the issuance of an *in personam* judgment against MBL. In pleading its § 183 defense, MBL likewise seeks to resist that common law remedy with a common law remedy, *i.e.*, an affirmative defense. Nothing in § 183, the general maritime law, basic principles of federalism, equity, or common sense suggests that MBL cannot do so or that the Tennessee state court is not empowered to hear and decide that defense.

The Limitation of Liability Act: Section 183 Confers a Right; Section 185 Creates a Remedy

The Tennessee Supreme Court held that the concursus procedure statutorily created by § 185 is not the exclusive means for asserting the substantive right to limit liability conferred by § 183. In so holding, that court implicitly recognized the distinction between a right and a remedy.

The § 183 limitation defense is an *in personam* right created by federal statute. Those lower federal courts which have come to the untenable and erroneous conclusion that the § 183 right to limit may be enforced *but not adjudicated* by the state courts, evidently were confused by the fact that Congress jurisdictionally limited the § 185 concursus proceeding without similarly limiting the § 183 substantive defense. Yet, when § 185 is critically studied, it becomes apparent that it bestows exclusive federal jurisdiction over the concursus proceeding on the federal courts simply because only a federal court could effectively be empowered to enjoin the courts of other states or enter an extra-territorial order requiring all claimants to file their claims in the concursus.[16]

The Section 183 right to limit is the very defense that is asserted in a § 185 concursus procedure; but, to repeat, § 185 does not provide the exclusive means of asserting the § 183 right. In fact, when a casualty involves only one claimant, as here, there is no need to tender the *res* (or a bond

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[16] 46 U.S.C. § 185(b).

as substitute) into the custody of the court and convoke a concursus. The vessel owner is not exposed to the risk and expense of multiple suits proceeding in multiple forums—the concerns which make a concursus attractive. The vessel owner is adequately protected by defending the claimant's suit and pleading § 183 as a defense. When Section 183 is pled as an affirmative defense in the injured party's own suit no concursus is convoked, no limitation fund is required and the six month time limitation that restricts the filing of the § 185 petition does not apply.[17] The reason that these unique characteristics of the § 185 concursus procedure do not apply to § 183 is straightforward—Congress specially tailored the concursus remedy to fit its unique purpose and in doing so specifically limited that remedy both jurisdictionally and temporally.[18]

A Section 185 concursus is indistinguishable in effect from a declaratory judgment action. *See* 28 U.S.C. § 2201. Section 185 simply accords a vessel owner the right to commence a concursus proceeding seeking a declaration

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[17] *Signal Oil & Gas Co. v. Barge W-701*, 654 F.2d at 1173; *Murray v. New York Central R. Co.*, 285 F.2d 152, 153-54 (2nd Cir.) *cert. denied* 366 U.S. 945 (1961); *Deep Sea Tankers v. The Long Branch*, 258 F.2d 757, 772 (2d Cir. 1958); *The Chickie* (3d Cir. 1944).

[18] The temporal six-month limitation was not contained in the 1851 enactment of the Limitation Act, but rather was added in 1936 to counter an abuse which had developed:

> [A] vessel owner could institute a proceeding to limit liability at any time, even after the question of liability had been decided against him [citations omitted]. To curb this abuse in 1936 Congress amended Section 185 to provide that an owner must file a limitation petition within six months after receiving a "written notice of claim."

Complaint of Okeanos Ocean Research Foundation, Inc., 704 F.Supp. 412, 413-14 (S.D.N.Y. 1989) (footnotes omitted). Because the *defense* of limitation must, by its nature, be pleaded in answer to a complaint, it necessarily cannot be used in this dilatory and unjust fashion. Accordingly, Congress had no reason to impose a time bar on the Section 183 *defense*. Had Congress intended to include the six-month time limitation in § 183, it would have simply included it in that *substantive* provision so as to apply *any time* the right is invoked.

that the vessel owner is entitled to limit its liability pursuant to the affirmative defense of § 183.

State Courts, Sharing Concurrent Jurisdiction With Federal Courts, Can and Should Decide the Section 183 Defense

The issue before this Court is whether a state court is empowered to adjudicate the merits of the affirmative defense created by § 183. The unrestrictive language of § 183 (in stark contrast to the jurisdictionally and temporally restricted language of § 185) along with basic principles of federalism, controlling United States Supreme Court decisions and persuasive state court opinions, conjoin to compel the conslusion that the Tennessee courts are empowered to adjudicate MBL's § 183 defense.

Section 183 states in mandatory terms that the liability of a vessel owner for a casualty caused without privity or knowledge "shall not ... exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."[19] This statute, supplementing general maritime law, creates a right unfettered by jurisdictional restraints. Unless, therefore, § 183 itself either limits the forums in which it may be asserted or unless a § 185 concursus is the only proceeding available in which to assert the § 183 substantive right, then the courts of Tennessee are duty-bound not only to *enforce* an uncontested §183 affirmative defense but also to *adjudicate* a contested one.

Had Congress intended to limit the forums in which the right could be asserted, § 183 would have contained the same jurisdictional limitation that is found in § 185.[20] The plain meaning of § 183 reveals no such limit. No sentence, clause, phrase or word in § 183 even so much as intimates that its defense can be adjudicated only in a federal court

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[19] 46 U.S.C. § 183a.

[20] The jurisdictional limitation would then apply across the board, and it would have been unnecessary to repeat it in § 185.

and/or in a § 185 proceeding. Indeed, a comparison of §§ 183 and 185 discloses no such Congressional intent. Section 183, in creating the substantive defense, reflects no jurisdictional constraint whatsoever in full recognition that the vessel owner will need the defense in federal court actions commenced under 28 U.S.C. § 1333 or 28 U.S.C. § 740 and in state court actions filed under the Saving to Suitors Clause. Section 185, in establishing a purely procedural vehicle for a vessel owner to convoke a concursus when confronted with the prospect of defending multiple lawsuits in perhaps multiple jurisdictions as the result of a multiple injury casualty, in stark contrast to Section 183, contains a jurisdictional limitation. Indeed, a concursus remedy, to be effective, requires an accompanying order enjoining the filing and/or prosecution of individual claimants' suits in federal or state forums. The inclusion of a jurisdictional restraint in §185 renders its omission in § 185 poignant. When Congress intended to limit jurisdiction, it did so in unequivocal terms. It is therefore clear both linguistically and conceptually that the jurisdictional constraint of § 185 does not apply to § 183—linguistically, because § 183, unlike § 185, contains no jurisdictionsl constraint; conceptually, because the nature of a § 185 concursus remedy requires a jurisdictional constraint; whereas the nature of a § 183 substantive defense (coupled with the fact that an injured party has the option of filing in federal or state court) requires that the defense be unrestricted in that regard.

At this juncture, MBL would point out the illogic in the holdings of *Cincinnati Gas* and *Vatican Shrimp*. When § 183 is asserted as an affirmative defense, the vessel owner bears the burden of proving lack of privity or knowledge.[21] What difference, then, can it make for purposes of a court's jurisdiction (or lack thereof) that the plaintiff contests the affirmative defense? The simple answer is that it makes absolutely no difference. In fact,

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[21] Section 183 grants the vessel owner a qualified defense. Its liability can be limited only if the negligent act or omission that caused the injury occurred without the vessel owner's privity and knowledge.

the highest courts of at least four states have ruled that the state courts possess jurisdiction over the § 183 affirmative defense,[22] and numerous intermediate state courts have adjudicated the defense on its merits.[23]

The U.S. Supreme Court's decisions in *Carlisle Packing Co. v. Sandager*[24] and later in *Langnes* expressly state that § 183 may be properly plead as an affirmative defense in state court. In *Carlisle Packing* the court found that the shipowner waived the § 183 defense by failing to plead it in his answer, but in so ruling the court first decreed:

> In a state court, when there is only one possible claimant and one owner, the advantage of this section may be obtained by proper pleading.

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[22] See supra note 14.

[23] *See, e.g., Fishboats, Inc. v. Welzbacher*, 413 So.2d 710 (Miss. 1982) (affirming trial judge's finding that owner had privity and knowledge of unseaworthy condition of vessel, and thus was not entitled to limit liability); *Darrel v. Southern P.R.Co.*, 17 So. 884, 886-87 (La. 1895) (denying limitation because shipowner had privity and knowledge of cause of casualty); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915)(State Workers' Compensation Board cannot award amount in excess of amount fixed by Limitation Act); *North Pacific S.S. Co. v. Industrial Acc. Comm'n of California*, 174 Cal. 346, 163 P. 199,203 (1917) ("Accident Commission would be duty bound to limit its award so that it would not exceed the [amount fixed by the Limitation of Liability Act]."); *Paladini v. Superior Court in and for City and County of San Francisco*, 218 Cal. 114, 21 P.2d 941, 943 (1933) ("The right of damage claimants to bring suits in the state court cannot, however, operate to deprive the vessel owners of the right guaranteed to them by act of Congress to limit their liability for losses comprehended within said act to the value of their respective interests in the vessel."); *Evansville Veneer & Lumber Co. v. Claybon*, 117 Ind. App. 499, 73 N.E. 2d 698 (1947) (remanded for factual finding of whether the vessel owner should prevail on its *defense* of limitation of liability); *State v. United States Fidelity & Guaranty Co.*, 24 P.2d 1037, 1041 (Ore. 1933) (denying limitation because the party asserting the right to limited liability was not the owner or charterer *pro hac vice*, as required by the Limitation Act — and in the process exercising jurisdiction to hear the limitation defense). Contra *Malone v. A.L. Mechling Barge Lines, Inc.*, 380 N.E. 2d 497 (Ill. App. 1978); *Cooper v. Allison*, 412 P.2d 356 (Ore. 1966).

[24] 259 U.S. 255 (1922).

In *Langnes* the court concluded that:

> [T]he state court, in an action there pending and in the due course of the exercise of its common law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under the statute dealing with that subject.[25]

On a fundamental level, basic principles of federalism dictate that a state court must apply a federally-created right. In *Hathorn v. Lovorn*, 457 U.S. 255 (1982), this Court declared that state courts are burdened with the duty—not merely vested with the option—to enforce federally-created rights in state court actions:

> If the Mississippi courts had the power to make this determination, then it is clear that they also had the duty to do so. "State courts, like federal courts, have a constitutional obligation ... to uphold federal law." 457 U.S. at 269.

The *Hathorn* court further stated:

> Only last Term we summarized the principles governing state court jurisdiction to decide federal issues. We begin, in every case, "with the presumption that state courts enjoy concurrent jurisdiction" over those claims. Only "an explicit statutory directive, [and] unmistakable implication from legislative history or ... a clear incompatibility between state-court jurisdiction and federal interests" will rebut the presumption. 457 U.S. at 266 (citations omitted).

See also *Galveston, H.&S.A.R. Co. v. Wallace*, 223 U.S. 481, 490 (1912), wherein this court stated that state courts have "the power to hear and determine causes of action created by Federal statute."

Despite these clear Supreme Court pronouncements,

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[25] 259 U.S. at 260.

the U.S. Fifth and Sixth Circuits, in *Vatican Shrimp* and *Cincinnati Gas,* respectively, have managed to misread *Langnes* and *Green* and spawn a number of erroneous decisions, which, like sheep in unthinking fashion, have merely followed the circuit courts' ill-reasoned lead.

MBL asks this Court to scrutinize *Cincinnati Gas* and *Vatican Shrimp.* In both, counsel for the vessel owner, inappreciative of the distinction between a § 185 remedy and a § 183 defense, *conceded* that the state court had no jurisdiction to adjudicate the § 183 defense.[26] The Fifth and Six Circuits' comments on the limits of a state court's jurisdiction over § 183 were *dictum,* and these two cases amply demonstrate why *dictum* is accorded so little precedential weight — it is devoid of adversarial exchange. *Langnes* and *Greene* do not say what *Cincinnati Gas* and *Vatican Shrimp* say they say. Moreover, they simply are not applicable to this case because MBL has not invoked a federal district court's § 185 concursus power.

***Langnes* and *Ex Parte Green* Do No Apply to This Case**

A thorough reading of *Langnes* and its follow-up *Green* will show that the two cases (like *Cincinnati Gas* and *Vatican Shrimp*) turn upon the fact that only a single claimant was injured in the casualty and the vessel owner had filed a § 185 concursus thus *depriving* the state court of jurisdiction by the express terms of the *statute.* The *Langnes* court recognized that differing interests were in conflict, thus requiring a balancing approach. The conflict naturally arises because an injured person has the right under the Saving to Suitors Clause to file its damage suit in state court and the shipowner has the right under § 185 to file a limitation action in federal court and have the state court action stayed. *See Langnes,* 282 U.S. at 539-41.

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[26] *See Cincinnati Gas,* 533 F.2d at 1002; *Vatican Shrimp,* 820 F.2d at 677. Although neither case expressly states this, a careful reading of the issues put to each court will reveal that in neither case did the defendant question whether the state could adjudicate the defense.

The Court in *Langnes*, recognizing that the need for a concursus was non-existent in a single-claimant dispute and that the shipowner had abused the procedure by filing its § 185 action two days before trial in the state court action, found an appropriate compromise to balance these competing interests. The Court lifted the § 185 injunction to allow the state court to decide the issue of liability while retaining jurisdiction in the federal court to hear the § 183 limitation defense, *if* the injured plaintiff contested the vessel owner-defendant's ability to limit.[27] In doing so, the Supreme Court was not pronouncing a universal rule that, as a matter of pure legal principle and statutory construction, should apply in all instances. Instead, the Court was adopting a compromise to accommodate competing rights in the narrow confines of the existing dispute (injured claimant's right to state court; vessel owner's right to concursus in federal court) wherein separate state and federal court actions were pending. Only as part of its Solomonic solution to these seemingly irreconcilable rights did the *Langnes* court issue its admonition to the plaintiff that *if* the plaintiff contested the shipowner's right to limit, the matter would return to federal court so that the § 185 petition could be heard.

The *Green* decision marked the return of the § 185 petition to federal court because the plaintiff contested the shipowner's right to limit. MAPCO simply misreads *Langnes* and *Greene* as creating the abstract, universal rule that a state court is never empowered to adjudicate the § 183 limitation defense. That restriction, however, applies only in the context of a single claimant casualty wherein the injured party wants to proceed in state court and the defendant-vessel owner wants to proceed in federal court.

MAPCO cites *In Re Bayview Charter Boats, Inc.*,

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[27] In other words, if the injured party should assert that the negligent act causing the claimant's injury was within the vessel owner's privity and knowledge so as to disentitle the vessel owner to the defense, then under the Court's compromise decree only the federal court could decide this issue.

692 F. Supp. 1480 (E.D.N.Y. 1988), and *Ohio River Co. v. City of Wheeling*, 225 F. Supp. 733 (N.D.W.Va. 1964), in support of its argument that state courts do not possess the requisite jurisdiction to adjudicate the § 183 affirmative defense. MBL urges this Court to study those cases carefully. Hasty consideration of authority, among other factors, has been responsible for much of the confusion and ill-reasoned *dictum* which has lead to the controversy now before this Court. Both *Bayview Charter* and *Ohio River Co.* are cases that observe, hastily and unthinkingly, that the federal court has exclusive jurisdiction to decide the § 183 affirmative defense. But *Bayview Charter* does so in the context of a pending § 185 concursus, so that the issue actually before the *Bayview* court was whether the § 185 concursus had been timely filed.[28] In *Ohio River Co.*[29] the shipowner filed a petition in federal court which the court held did not conform to the procedural requirements of § 185 and was beyond the six month time limitation. Indeed, counsel for the shipowner *stipulated* that the state court was divested of jurisdiction over its § 183 affirmative defense.[30] Neither case is like the instant one. MBL has *not* elected to commence a § 185 concursus so that the competing interests, the presence of which engendered the *Langnes/Green* compromise, are not present here. Accordingly, the general rule that a state court must apply a federal defense is not altered.

The other *federal* cases[31] cited by MAPCO all in-

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[28] *Bayview Charter*, 692 F. Supp. at 1481 ("*Bayview Charter Boats, Inc.* ... commenced this proceeding pursuant to 46 U.S.C. § 185 ... to limit its potenetial liability ....") *See also, In re S. S. American Trader*, 616 F. Supp. 315 (S.D.N.Y. 1985), involving the very same procedural context as *Bayview Charter*, with the court espousing similar *dicta*.

[29] 225 F. Supp. 733.

[30] 225 F. Supp. at 734.

[31] *Great Lakes Dredge & Dock Co. v. Lynch*, 173 F.2d 281 (6th Cir. 1949), *Jefferson Barracks Marine Service v. Casey*, 673 F.2d 1007 (8th Cir. 1985), *In re Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla.

volve the same procedural posture as *Langnes* and its companion *Green*. In each the shipowner divested the state court of jurisdiction by invoking the § 185 concursus. MBL would ask that any lower *federal* court authority cited for the proposition that a *state* court does not have jurisdiction over § 185 be scrutinized — if the case is before a federal court, it probably will be there by virtue of a pending § 185 concursus proceeding. This single element distinguishes the present case from *Langnes, Green* and the lower federal authorities upon which MAPCO misinformedly relies. MBL has not filed a § 185 concursus so as to create the conflict that was addressed and solved in *Langnes* and *Green*. Accordingly, the basic rule that a state court must apply general maritime law including supplementary statutes applies.

MBL emphasizes that the Supreme Court in *Langnes* observed that, had the vessel owner elected to do so, it could have pled the § 183 limitation defense in the state court action and obtained a complete resolution of that defense on its merits in the state court proceeding:

> [T]his court has accepted the view that, in a state court, when there is only one possible claimant and one owner, the advantage of this section ... [46 USCA § 183 ...] may be obtained by proper pleading.
>
> Upon the present record, the necessary result of this holding is that the state court, in the action there pending and in the due course of the exercise of its common-law powers, was competent to entertain a claim of the shipowner for a limitation of liability and afford him appropriate relief under

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(footnote 31 continued)

1985), *Ohio River Company v. Carrillo*, 754 F.2d 236 (7th Cir. 1985), *In re North Lubec Mfg. & Canning Co.*, 640 F. Supp. 636 (D.Me. 1986), *In re Dammers & Vanderheide*, 836 F.2d 750 (2d Cir. 1988), *In re Cooper/T. Smith Stevedoring Co.*, 735 F. Supp. 689 (E.D. La. 1990) and *In re Great Lakes Transit Corp.* 63 F.2d 849 (6th Cir. 1933).

the statute dealing with that subject.[32]

MBL did just that.

MBL further emphasizes that the seemingly dogmatic pronouncement in *Green* that the state court had no jurisdiction to hear the § 183 defense must be considered in context. The *Green* Court made that statement in response to the injured plaintiff's refusal to honor the *Langnes* compromise by contesting the shipowner's right to limit in the state court action.

Applying the very principles upon which MBL relied in asserting its § 183 right by way of affirmative defense, the Supreme Court in *Langnes* hastened to add that the vessel owner was not obliged to assert its § 183 limitation defense in state court but could opt for the other procedural means of doing so by filing a § 185 petition in federal court and pleading the § 183 limitation defense in that proceeding:

> Notwithstanding this, however, the shipowner was free to invoke the jurisdiction of the federal District Court; and, that having been done, the question which arose was not one of jurisdiction, but as will later more fully appear, was whether as a matter of discretion that jurisdiction should be exercised to dispose of the case.[33]

When viewed in its proper procedural context, then, it is evident that nothing in *Langnes* even so much as intimates that, as an absolute proposition of law, a state court under no circumstances is competent to hear a § 183 limitation defense. *Langnes* does not hold that where, as here, the vessel owner elects to proceed with its § 183 limitation defense as an affirmative defense in the state court action, the state court does not have jurisdiction.

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[32] 282 U.S. at 540 (citations omitted).

[33] *Id.* at 540-41 (citations omitted).

Langnes holds only that when the sole injured party sues in state court *and* the vessel owner responds by filing a § 185 petition in federal court, the federal court in the sound exercise of its jurisdiction should relinquish its jurisdiction over the liability phase of the case in deference to the injured party's right to trial by jury.

It bears emphasis that MBL, in accordance with *The Chickie* and *Signal Oil* decisions, had two equally viable means of asserting its limitation defense: (1) pleading it as an affirmative defense in MAPCO's Tennessee state court action; or (2) commencing its own § 185 limitation proceeding wherein, *inter alia*, liability and limitation would be heard — subject, of course, to federal trial judge's discretion to permit the previously filed state court action to proceed on the issue of liability. MBL chose the former, and, as a consequence, the conflict that spawned *Langnes* and *Ex Parte Green* never arose. MAPCO now advances the anomalous and bizarre proposition that the § 183 limitation defense can be asserted as an affirmative defense in a state court action but that, when and if the injured plaintiff contests the vessel owner's right to limit liability, the state court somehow mysteriously and inexplicably is ousted of jurisdiction to resolve these issues on the merits. And MAPCO urges that bizarre result even though basic principles of federalism mandate a state court to apply federal law, even though general maritime law including statutes must be applied by the state court in a Saving to Suitors Clause case and even though nothing in § 183 purports to alter these principles of federalism.

MBL Has Timely Asserted Its Affirmative Defense

MAPCO commenced suit approximately nine months after the casualty. MBL answered and asserted limitation of liability as an affirmative defense. The driving force of the present petition and the appeals below is really not a question of jurisdiction but a question of timeliness. MAPCO chose the state forum to adjudicate its claim for damages and has not once argued that a state court adjudication of MBL's right to limit would in some way

prejudice MAPCO's rights or limit MAPCO's ability to controvert the defense. On the contrary, MAPCO cites *Cincinnati Gas* and its *dictum*-borne progeny in an opportunistic effort to divest MBL of its statutory defense, before the merits are even heard. Indeed, MAPCO's initial choice of a state forum may have been motivated by this design.

Because MBL had no need to petition the federal court for a concusus, it was satisfied to assert its right to limit as an affirmative defense. The six month time limit found in and applicable to § 185 does not apply to § 183 when it is asserted as an affirmative defense, [34] so the six month time limit in § 185 passed without MBL's filing a concursus. The passage of six months merely extinguished MBL's right to file a § 185 concursus but in no way affected the timeliness of the assertion of a § 183 defense. Thereafter, had MAPCO commenced its suit in federal court, MBL unquestionably could have asserted limitation as an affirmative defense. The question, therefore, is whether MAPCO's choice of forum should alter this result. If so, the practical result will be to force shipowners to convoke a § 185 concursus *every time* the potential exists for limitation of liability to preserve the § 185 defense, *even* if there is only one potential claimant and the concursus procedure is unnecessary. Surely Congress could and would not have intended such an inefficient and unwieldy procedure.

The Tennessee Courts Were Not Bound To Follow Lower Federal Court *Obiter Dictum*

MAPCO correctly argues that a Supreme Court determination of a federal question is binding on the state courts.[35] This most fundamental aspect of federalism is

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[34] *Signal Oil*, 654 F.2d at 1173; *Murray*, 285 F.2d at 153-54; *The Long Brance*, 258 F.2d at 772.

[35] MAPCO Petition at 23 n.12, citing *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 221 (1931).

premised upon the Supremacy Clause of the U.S. Constitution,[36] from which the Supreme Court's appellate jurisdiction over the state court is derived.[37] Lower federal courts, on the other hand, exercise no appellate jurisdiction over the state courts, and therefore their decisions do not constitute mandatory authority.[38] Indeed, the relationship between the state and lower federal courts has been described in terms of "a parallelism . . . [without] paramountcy for both sets of courts are governed by the same reviewing authority of the Supreme Court."[39] MAPCO cites *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209 (1931), in support of the proposition that "[t]he Tennessee Supreme Court was required to follow *Vatican Shrimp* and *Cincinnati Gas.*"[40] Yet *Chesapeake & Ohio Railway* simply holds that the state courts are bound to follow Supreme Court — not lower federal court — precedent.[41] MAPCO can muster no authority for the untenable premise that the Tennessee Supreme Court was bound to follow lower federal court holdings much less *obiter dictum* that is demonstrably wrong.[42] Indeed, the Tennessee high court was duty-bound to follow this Court's precedent in *Langnes* and *Green* to the extent this prece-

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[36] U.S. Const. Art. VI, cl.2.

[37] *Freeman v. Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) *quoting U.S. v. Woods*, 432 F.2d 1072, 1075 (7th Cir. 1970); *cert. denied*, 402 U.S. 983 (1971).

[38] *U.S. v. Woods*, 432 F.2d at 1076.

[39] *Freeman*, 962 F.2d at 1258 *quoting Woods*, 432 F.2d at 1075.

[40] MAPCO Petition at pp. 21-22.

[41] *Chesapeake & Ohio Railway Co. v. Martin*, 283 U.S. 209, 221 (1931).

[42] *See U.S. v. Crawley*, 837 F.2d 291 (7th Cir. 1988) for an excellent explanation of why *dictum* has no binding precedential effect.

dent applied, and the duty to follow necessarily entails the duty to interpret.[43] Indeed, this Court in *Asarco, Inc. v. Kadish*, 490 U.S. 605 (1989), expressed complete confidence in the competency of state courts:

> [S]tate courts...possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law.

490 U.S. at 617.

The power of the state courts to interpret federal law, recognized in *Asarco*, should not be emasculated by devotion to MAPCO's notion that state courts must blindly follow *obiter dictum*, even when, as here, the state court recognizes that the *dictum* is wrong.

CONCLUSION

The Tennessee Supreme court correctly interpreted this Court's decisions in *Langnes* and *Green*, concluding that the Tennessee courts are empowered not only to enforce but also to adjudicate the § 183 limitation defense. The Section 185 concursus is not the only means for asserting limitation of liability, and when asserted as an affirmative defense the six month time limitation does not apply. MBL's affirmative defense is well founded and should be decided on its merits. Accordingly, MAPCO's petition should be denied.

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[43] *See, e.g., Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982) ("State courts, like federal courts, have a constitutional obligation. . .to uphold federal law.")

Respectfully submitted,

O'NEIL EICHIN, MILLER & BRECKINRIDGE

MACHALE A. MILLER
MARVA JO WYATT (#18052)
One Poydras Plaza, 26th Floor
639 Loyola Avenue
New Orleans, Louisiana 70113
504/525-3200
Attorneys for Respondent Memphis Barge Line

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 1993, a copy of this pleading has been served upon each other party to this action by depositing same in the United States mails, properly addressed to his, her or its counsel of record, first class postage prepaid.

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MACHALE A. MILLER